

(2014) 09 P&H CK 0215

In the Punjab And Haryana At Chandigarh

Case No : Criminal Appeal Nos. S-1198 and 1219-SB of 2001

Sahab Singh

APPELLANT

Vs

State of Haryana

RESPONDENT

Date of Decision : 10-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 313
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 15, 42, 42(2), 50, 57

Citation : (2015) 1 RCR(Criminal) 594

Hon'ble Judges : Ashutosh Mohunta, J

Bench : Single Bench

Advocate : Aditi Girdhar, Amicus Curiae and Rahul Vats, Advocate for the Appellant; P.S. Punia, Additional Advocate General, Advocate for the Respondent

Final Decision : Allowed

Judgement

Ashutosh Mohunta, Actg. C.J.—This judgment will dispose of Criminal Appeal No. S-1198-SB of 2001 and Criminal Appeal No. S-1219 SB of 2001 arising out of impugned judgment and order of sentence dated 05/09/2001 passed by Ld. Special Court, Karnal whereby the appellants have been held guilty u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "The Act") and in furtherance thereof have been sentenced to undergo rigorous imprisonment for a period of 10 years each and to pay a fine of Rs. 1 Lakh each. In default of payment of fine, each of the appellants have been ordered to further undergo simple imprisonment for one year.

2. The factual matrix of the facts are being taken from Criminal Appeal No. S-1198-SB of 2001. On 28/10/1998, SI Bhoop Singh, accompanied by other police officials, was present near the bridge of Barsati Nalla in the area of village Brass. He received secret information that the appellants are indulging in the sale of "Chura post" and that they were coming to village Brass on their separate motorcycles with the contraband. Believing the information trustworthy, a Naka

was organised in front of the house of Pala Ram son of Nathi Ram. He was also joined in the investigation. Meanwhile, Sh. Om Parkash, Naib Tehsildar, Nissing came there. He was apprised of the facts. Thereafter, the appellants were seen coming on their respective motorcycles. Appellant Saheb Singh was riding Rajdoot motorcycle loaded with 1 gunny bag while appellant Lakha Singh was riding Yamaha motorcycle loaded with 2 gunny bags. On seeing the police party, they tried to escape from the spot with their respective motorcycles. An effort was made to overpower them by the police officials in which Saheb Singh was apprehended while Lakha Singh managed to escape from the scene leaving behind his motorcycle with 2 gunny bags loaded on the same.

3. Notice u/s 50 of the Act was served upon Appellant Saheb Singh. He opted to be searched by the Magistrate. Upon this, Naib Tehsildar disclosed his identity to him. He also disclosed that he (Naib Tehsildar) is competent to conduct the search. Gunny bags were unloaded from the motorcycles by Saheb Singh and was checked by the Naib Tehsildar whereupon poppy straw was found in the same. On weighing, the contraband in each bag came to 40 Kgs. Out of the same, 250g was separated as sample from each bag. The sample and the remaining contraband were sealed in different parcels and were taken into possession by the police along with the motorcycles. Seals after use, was handed over to witness Pala Ram. Case was registered and on completion of the investigation and on the basis of material available, the appellants were charged u/s 15 of the Act to which they pleaded not guilty and claimed trial.

4. In support of the case, the prosecution examined HC Gajraj Singh as PW 1, Parkash, Niab Tehsildar as PW 2, HC Bal Kishan as PW 3, Constable Raj Singh as PW 4, Ram Chander Ahlmed as PW 5, Inspector Pardeep Singh as PW 6, SI Bhoop Singh as PW 7 and ASI Subash Chand as PW 8 and thereafter closed their evidence.

5. On conclusion of the prosecution evidence, statement of the appellants u/s 313 Cr.P.C. recorded wherein they pleaded that they have been falsely implicated. In support of their case, ASI Rambhaj was examined as DW 1 by Saheb Singh who stated that a telegram was received from wife of Saheb Singh on 30/10/1998 wherein it was stated that her husband Saheb Singh was picked up by the police from dera. No evidence was led by Lakha Singh in his defence and accordingly they closed their evidence.

6. It has been argued by the counsel for the appellants that there is non-compliance of Section 50 of the Act in as much as defective offer of search was made by the investigating officer (PW 7) whereby he offered accused Saheb Singh whether he wants to get search conducted before the gazetted officer or by him. Reliance was placed upon The Hon'ble Supreme Court of India in the case of State of Haryana Vs. Jarnail Singh and Others, He further argued that no secret information was either reduced into writing nor the same was sent to the superior officer and thus the mandatory provisions of Section 42 of the Act have been violated. Reliance was placed upon Karnail Singh Vs. State of Haryana, ,

Sukhdev Singh Vs. State of Haryana, It was further argued that Lakha Singh was not apprehended at the spot and was named subsequently by Sahab Singh by way of disclosure statement suffered before the police and that police has miserably failed to connect Lakha Singh with the contraband recovered. It was further stated by the counsel for the appellants that no test identification parade has been held for establishing the identity of Lakha Singh as he was not apprehended from the spot and that the only independent witness (Pala Ram) joined in by the police for the purposes of raid, has not been examined and given up by the prosecution. In the end, it was prayed that the appeal be accepted and conviction of the appellants be set-aside.

7. Per contra, the Ld. State Counsel has argued that Section 50 of the Act is not applicable under the facts and circumstances of the present case. Lakha Singh was identified by PW 1 and PW 7 and so his identity is fully established in the present case. Sahab Singh was apprehended at the spot and contraband was recovered from his possession which was duly taken into possession by the investigating officer after following due procedure as mandated under the Act and further he is facing another trial under the N.D.P.S. Act.

8. I have heard the Ld. counsel for the appellants as well as the state counsel, who is also the amicus curiae, at length and have perused the case file.

9. As per PW 1, HC Gajraj Singh, "investigating officer gave an offer to accused Sahab Singh whether he wants to get search conducted before the gazetted officer or by him. He again said the offer was given in writing to the effect whether he wants to get search conducted before gazetted officer/Executive Magistrate or by him to which the accused replied that he wants to get search conducted before some Executive Magistrate". However as per investigating officer PW 7, SI Bhoop Singh, "notice Ex. PF was given to the accused as to whether his search be effected by him or gazetted officer. Again said whether his search be effected in the presence of Executive Officer. The accused opted search in the presence of Magistrate". The said offer given to the accused by the investigating officer is a defective search offer in view of the provisions of Section 50 of the Act in as much as the same mandates that the officer duly authorised to conduct the search upon any person under the provisions of this Act, shall if such person so requires, take such person without unnecessary delay to the nearest gazetted officer or to the nearest Magistrate. In the present case, the investigating officer without any authority or cause has offered search to the accused by himself. Even the option to get searched before the Magistrate was not given to accused Sahab Singh and thus apparently there is flagrant violation of Section 50 of the Act. Even otherwise on a bare perusal of Section 50 of the Act, it would transpire that the same is only applicable where personal search of accused is made. Since in the present case, recovery has been effected from the motor cycle of the accused therefore the provisions of Section 50 of the Act are not attracted in so far as it gives notice of search to the accused. The Hon'ble Supreme Court of India in the case of Jarnail Singh (supra) has held in paragraph

No. 5 that "language of Section 50 is clear and unambiguous and the law well settled that it is not possible to take a different view. We must, therefore, hold that Section 50 of the NDPS Act did not apply to the facts of this case, where on search of a tanker, a vehicle, poppy husk was recovered. This not being a case of personal search, Section 50 was not applicable". Thus in view of the law laid down by the Hon''ble Supreme Court of India in the case of Jarnail Singh's case (supra), there is an inescapable and irresistible conclusion that the provisions of Section 50 of the Act are not applicable to the facts and circumstances of the present case in as much as admittedly the recovery has been effected from gunny bag laden on the motorcycle which the accused was driving and no recovery has been effected from the person of the accused.

10. Even otherwise also, the offer of search made to the accused by the investigating officer was a defective one as is apparent on perusal of his statement while deposing as PW 7 in the Court. The accused was not even apprised of his right to get search conducted before the Magistrate and hence in view of the same the offer made to the accused cannot be said to be salutary compliance of Section 50 of the Act.

11. The sole independent witness in the present case, Pala Ram, in whose presence the raid was conducted and recovery effected from the motor cycle driven by Sahab Singh has not been examined by the prosecution but rather has been given up as having won over by the accused. Other than the said witness there is no other independent corroboration to establish the authenticity of the raid and recovery of contraband from the accused especially when it has come on record that the place of recovery was within the Abadi of village Brass. Even no test identification parade of the accused was carried out by the police as has been admitted by PW 1-HC Gajraj Singh in his cross examination and thus in the absence of any independent corroboration with regard to the authenticity of the raid and identity of the accused apprehended in the same, conviction of the appellants cannot be sustained.

12. It is a case of the prosecution as per PW 1 that seal after use was handed over to Pala Ram. Since Pala Ram in the present case has been given up as having won over by the accused, therefore, the very authenticity of the raid and the contraband so recovered from the accused becomes highly doubtful in as much as other than the said witness there is no other independent corroboration to the version put forth by the prosecution.

13. Further, admittedly as per PW 7, SI Bhoop Singh, the secret information was neither reduced into writing nor sent to the higher officer which is an apparent violation of Section 42 of the Act. That since the FIR in the present case is dated 28/10/1998 therefore the un-amended provisions of Section 42 of the Act will apply as the same was amended by Act 9 of 2001 w.e.f. 02/10/2001. Hon''ble Supreme Court of India in the case of Sukhdev Singh Vs. State of Haryana, has held as under:-

"18. In the present case, the occurrence was of 4th February, 1994. The Trial of the accused concluded by judgment of conviction dated 4th July, 1998. Thus, it will be the unamended Section 42(2) of the Narcotic Drugs And Psychotropic Substances Act that would govern the present case. The provisions of Section 42 are intended to provide protection as well as lay down a procedure which is mandatory and should be followed positively by the Investigating Officer. He is obliged to furnish the information to his superior officer forthwith. That obviously means without any delay. But there could be cases where the Investigating Officer instantaneously, for special reasons to be explained in writing, is not able to reduce the information into writing and send the said information to his superior officers but could do it later and preferably prior to recovery. Compliance of Section 42 is mandatory and there cannot be an escape from its strict compliance.

22. There is patent illegality in the case of the prosecution and such illegality is incurable. This is a case of total non-compliance, thus the question of substantial compliance would not even arise for consideration of the Court in the present case. The twin purpose of the provisions of Section 42 which can broadly be stated are that: (a) it is a mandatory provision which ought to be construed and complied strictly; and (b) compliance of furnishing information to the superior officer should be forthwith or within a very short time thereafter and preferably post-recovery.

23. Once the contraband is recovered, then there are other provisions like Section 57 which the empowered officer is mandatorily required to comply with. That itself to some extent would minimize the purpose and effectiveness of Section 42 of the Narcotic Drugs And Psychotropic Substances Act. It is to provide fairness in the process of recovery and investigation which is one of the basic features of our criminal jurisprudence. It is a kind of prevention of false implication of innocent persons. The legislature in its wisdom had made the provisions of Section 42 of Narcotic Drugs And Psychotropic Substances Act mandatory and not optional as stated by this Court in the case of Karnail Singh (supra)."

14. As far as the case of Lakha Singh is concerned, appellant in Criminal Appeal No. S-1219 SB of 2001, he was neither apprehended at the spot nor any recovery has been effected from him. He has been arrested in the present case on the disclosure statement made by Saheb Singh. Even no test identification parade was held by the investigating officer to establish the identity of Lakha Singh. Even no attempt or effort to apprehend him was made and nor he was known to the police as has been admitted by PW 1, HC Gajraj Singh in his cross examination. It has further come on record by way of statement of PW 8, ASI Subhash Chand that the accused himself surrendered in the court of the then ASJ, Karnal on 29/01/1999 i.e. after 3 months of the occurrence. In the present case, since the identity of accused Lakha Singh is under a cloud therefore he deserves to be acquitted on extending benefit of doubt to him. This court in the

case of Pappu Singh and others Versus State of Haryana [2013 (4) RCR (Criminal) 402] has held as under:-

"15. In this case, none of the accused was arrested from the spot. There is no explanation on record as to how the police officials identified the accused. There is nothing on record to suggest that the members of the police party knew the accused earlier, if so, the context as to how the police party knew them has not been cited. No test identification parade was got conducted by the prosecution. So, the identity of the accused, who ran away from the spot, could not be matched with the present accused, who were suspected to be the actual culprits. There are chances of mistaken identity in this case. The ASI who allegedly recognised the accused, was not having any friendship or thick relations with the present accused leaving no doubt about the identity of the ran away accused. There is possibility of framing the present accused merely on suspicion.

19. There were large number of police officials in the raiding party in the jeeps. As per the version of the Investigating Officer, they were at a distance of some yards from the accused, when they ran away. All the police officials were armed with the dandas and other weapons. In the circumstances, much remains to be explained by the prosecution as to how all the accused escaped and trained police officials could not capture a single accused."

15. Further in the case of Satnam Singh Vs. State of Punjab, it has been held in paragraph No. 12 as under:-

"12. First of all, I take up the case of Satnam Singh appellant. To be determined herein is as to whether his identity has been established by the prosecution. Under the stress of cross-examination PW-3 Sub Inspector Harinder Singh investigator has deposed that " I knew earlier to accused Satnam Singh. I did not mention in the ruqa Ex. PU that I was known to the accused prior to the incident. Similarly this fact is not mentioned in the memos prepared at the spot." It is beyond comprehension as to why the fact that Satnam Singh appellant was known to this witness earlier was not mentioned in the ruqa or other documents prepared at the spot; if this witness was known to this appellant previously. This gives an inkling that he has made improvement in his statement in material particulars to the effect that this appellant was known to him prior to this recovery. Furthermore, he has nowhere stated that this appellant was either arrested by him in any other case prior to this recovery or he had dealt with any other case in which this appellant was involved. Admittedly, the test identification parade was also not carried out. The necessity for holding an identification can arise only when the accused are not previously known to the witnesses. It is desirable that a test identification parade should be conducted as soon as after the arrest of the accused. It becomes necessary to eliminate the possibility of the accused being shown to the witnesses prior to the test identification parade. Much evidentiary value cannot be attached to the identification of the accused in Court where identifying witness is a total stranger who had just a fleeting glimpse of the person identified or who had no particular reason to remember

the person concerned, if the identification is made for the first time in court as ruled by the Supreme Court in re: Heera and Another Vs. State of Rajasthan, . In the instant one, the recovery took place at 5.00 A.M. though in the month of March, nonetheless, while fleeing only back side of the appellant Satnam Singh would have been seen by the Investigating Officer. It is not in his evidence that he had seen the face of the appellant nor it could be so for the reason that if this witness as well as this appellant had come face to face in that eventuality the latter by all probabilities would have been intercepted. On appraisal of investigator's evidence, it transpires that he was a stranger to Satnam Singh appellant. If it is assumed for a little while that he had just a fleeting glimpse, despite that it cannot be said with absolute certitude that he had become familiar with his identifying features or physical description. Thus, there can be no escape from the finding that the prosecution has dismally failed to pin down the identity of this appellant."

16. Even the prosecution has not been able to connect the motor cycle bearing registration number HR-05-E-8026 make Yamaha alleged to have been recovered during the occurrence with Lakha Singh as the said motorcycle was given on superdari to one Darshan Singh son of Jagat Singh by Ld. Special Judge, Karnal vide order dated 31st May 1999 and hence neither the identity of Lakha Singh nor the motorcycle being allegedly driven by him has either been established or proved on record by the prosecution and therefore he on being extended the benefit of doubt in the present case, is hereby acquitted.

17. In view of the foregoing discussion both the appeals are allowed, the impugned judgment and order dated 05/09/2001 passed by Ld. Special Court, Karnal is hereby set-aside and the appellants are acquitted of the charges framed against them. Both the appellants are on bail and accordingly their bail bonds stands discharged.

Appeals allowed.